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Regional Human Rights Courts and Specialised Treaty Mechanisms for Investor-State Dispute Resolution

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Domestic Measures Adopted by States to Give Effect to Processes of International Dispute Settlement Volume III: Regional Human Rights Courts and Specialised Treaty Mechanisms for Investor-State Dispute Resolution

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The purpose of the present report is to provide an overview and analysis of the measures that States adopt internally to implement treaties establishing international court and tribunals and other international dispute settlement mechanisms ("IDSM treaties"). Although this report cannot be comprehensive in its survey of practices across all States, this analysis is intended to be useful in three ways. First, it can be useful with respect to the design and drafting of an instrument establishing a multilateral investment dispute settlement mechanism. Second, it can be useful for States when considering what types of implementing measures they may need to adopt in order to give effect to the jurisdiction of a multilateral investment dispute settlement mechanism. Third, it provides insights into the kind of capacity building and technical assistance that States may need in order to adopt such measures.

The approach of the research contained within this report has been to gather information about State experiences with respect to IDSM treaties both at the international and regional levels, giving special attention to a number of recurrent questions: (i) What provisions in IDSM treaties require or implicate the need for States to adopt domestic measures? (ii) What measures do States in fact take in domestic law to give effect to IDSM treaties? (iii) What steps do States take in domestic law to ensure the funding of their contributions to maintain international courts and tribunals or other bodies tasked with administering dispute settlement frameworks? (iv) What kinds of measures do States adopt in order to ensure that the decisions issued pursuant to the dispute resolution mechanisms of an IDSM treaty are given legal effect within the domestic order?[1] To address these questions, each IDSM treaty is analysed to determine which of its provisions implicate a need or desirability for contracting States to adopt measures to give effect to their rights and obligations. Thereafter, the report analyses the domestic measures adopted (or not) in selected States in connection with the IDSM treaty.

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[1] This report does not address the fundamental question of how States broadly receive international treaty obligations into domestic law. While this question raises addresses a central issue regarding the interplay between domestic legal systems and international law, given its generality and scope it is not treated in a systematic way in this report. Instead, as noted in the text, this report focuses specifically the measures that States adopt to implement IDSM treaties. For more information, see generally Malcolm N. Shaw, *International Law* (6th ed., Cambridge University Press 2008), 129-132.

The report proceeds in three volumes. Volume I begins by providing an examination of international dispute settlement mechanisms such as the ICSID Convention, the New York Convention, and the Singapore Convention. While these mechanisms do not establish international courts or tribunals as such, they do establish mechanisms requiring a grant of jurisdiction by participating States with respect to the matters which come within their scope. Volume II continues by looking at international and regional courts and tribunals, both those which have jurisdiction to hear disputes between States and those which have jurisdiction to hear disputes between States, e.g., the Dispute Settlement Body under the WTO agreements, and non-State actors, e.g., the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea. Volume II also includes an overview of regional dispute settlement arrangements which do not rely upon standing courts and tribunals but instead use arbitration, such as the MERCOSUR dispute settlement mechanism. Finally, this volume, Volume III, addresses the implementation of regional courts designed to address human rights claims (e.g., the European Court of Human Rights) as well as specialised dispute settlement mechanisms designed to address investor-State disputes under treaties providing substantive protection to investors and their investments (e.g., the Arab Investment Court and the investment court system established under the European Union's recent treaties). Volume III also contains this report's conclusions, providing a final assessment and set of observations on State experience with domestic law amendments when signing onto IDSM treaties.

I. Regional Human Rights Courts

This Part provides an overview of the measures taken by States to give effect to regional human courts and tribunals, namely, the African Court on Human and Peoples' Rights, the European Court of Human Rights, and the Inter-American Court on Human Rights.

A. African Court on Human and Peoples' Rights[2]

The African Court on Human and Peoples' Rights ("ACtHPR") was established by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the "ACtHPR Protocol").[3] The mandate of the ACtHPR is to complement and reinforce the functions of the African Commission on Human and Peoples' Rights (the African Commission – often referred to as the Banjul Commission), which is a quasi-judicial body charged with monitoring the implementation of the Charter.[4]

Two instruments govern the Court: the ACtHPR Protocol[5] and the ACtHPR Rules of Court.[6] Under Article 34 of the ACtHPR Protocol, a State may accept the jurisdiction of the Court in respect of

[2] In principle, the ACtHPR was to merge with the Court of Justice of the African Union (into the African Court of Justice and Human Rights). The merger has not yet taken place due to a lack of necessary ratifications. For the current status of signatories, see https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights.

[3] The Protocol establishing the ACtHPR was adopted on 9 June 1998 in Burkina Faso and came into force on 25 January 2004 after it was ratified by more than fifteen countries.

[4] The African system for the protection of human rights consists of the African Commission on Human and Peoples' Rights, which serves as a complaint and reporting mechanism, and the African Court on Human and Peoples' Rights, whose decisions are legally binding on the State Parties.

[5] See Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights. Thirty African States have ratified the instrument.

[6] African Court on Human and People's Rights, Rules of Court (1 Sept. 2020).

complaints by individuals and NGOs. In the history of the Court, eleven States have deposited such declarations, although four States have later withdrawn their declarations.[7]

1. Summary of State Obligations Created by Accepting the Jurisdiction of the ACtHPR

Different provisions of the ACtHPR Protocol and the ACtHPR Rules of Court give rise to the need for implementation in domestic legal orders, thereby requiring and/or permitting States to adopt domestic measures in order to ensure its effective operation. A summary of these provisions follows.[8]

ACtHPR Protocol

- Article 30 provides that State Parties "undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution."

- Article 31 requires the ACtHPR to submit annually a report on its work during the previous year to the Assembly, which "shall specify, in particular, the cases in which a State has not complied with the Court's judgment."[9] It bears noting, however, that in the event of non-compliance the Assembly has no enforcement powers.

ACtHPR Rules of Court

- Rule 81 sets out a "Procedure for Monitoring Compliance with Decisions of the Court".

- Rule 59(5) gives the ACtHPR the ability to "invite the parties to provide it with information on any issue relating to the implementation of the provisional measures".

- Rule 66 establishes a pilot-judgment procedure through which the ACtHPR may prescribe "the type of remedial measures which the Respondent State is required to take at the domestic level by virtue of the operative provisions of the judgment and the time within which the measures shall be implemented."

2. State Practice Implementing the Obligations of the ACtHPR Protocol

None of the thirty States parties has enacted specific laws or regulations implementing the commitments contained in the ACtHPR Protocol or ACtHPR Rules of Court. This absence of domestic measures, combined with the absence of powers by the Assembly to compel compliance, has meant that compliance with ACtHPR decisions is still effectively voluntary. Thus, compliance ultimately depends on additional factors such as the political commitment of the respondent State and the participatory role of civil society.[10]

In its 2021 annual report to the African Union Assembly, the Court indicated instances of non-compliance with its decisions, and highlighted the major challenges facing the ACtHPR:

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[7] Tunisia has signed a declaration but has not deposited it. For the complete list, see https://www.african-court.org/wpafc/declarations/.

[8] See Scott Lyons, "The African Court on Human and Peoples' Rights", 10(24) *ASIL Insights* (19 Sept. 2009).

[9] The ACtHPR reports directly to the Executive Council of the African Union, which is required to monitor its execution on behalf of the Assembly of Heads of State and Government (Assembly). See ACtHPR Protocol, Art. 29.

[10] Franz Viljoen, *Max Planck Encyclopedia for Public International Law* (online).

> "One of the major challenges facing the Court at the moment is the perceived lack of cooperation from Member States of the African Union, in particular, in relation to the poor level of compliance with the decisions of the Court. Of the over 100 judgments and orders rendered by the Court, as at the time of writing this Report, only one State Party, that is, Burkina Faso, had fully complied with the judgments of the Court, one other State, the United Republic of Tanzania, has complied partially with some of the Judgments and orders against it, the Republic of Côte d'Ivoire has filed its compliance report but the Applicants dispute the facts, while the other States such as Benin, Libya and Rwanda, have not complied at all, with some openly indicating that they will not comply with the orders and judgments of the Court."[11]

Reportedly, the African Union is discussing three initiatives to strengthen enforcement: 1) a new framework for the implementation of judgments of the Court, 2) the establishment of an African Judicial Network, and 3) the operationalization of the African Union Legal Aid Fund.[12] As conceived, these initiatives are intended to enhance access to the Court and to engage meaningfully with States and other stakeholders.[13] These initiatives are pending at present.

3. Examples of Related National Reforms in African States

While research has revealed no specific legislation implementing or supporting the jurisdiction of the ACtHPR, it bears noting that some African States have recently enacted general legislation that is relevant for the enforcement of ACtHPR decisions (even if not specifically designed to do so). Examples of these measures are given below.

a. Burundi

In 2005, Burundi adopted *Loi. No.1/07, Regissant la Cour Supreme, Republique du Burundi Cabinet du President*, which includes a provision empowering the Supreme Court to enforce decisions from international human rights judicial and quasi-judicial bodies.[14] It is not clear whether the power established under this law has been exercised by the Court.

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[11] AU Annual Report 2021, para. 37. It is important to indicate here that for the moment the Court does not have an independent mechanism to verify the extent of implementation on the ground. It relies almost exclusively on the Report of the Government and reaction of Applicant thereto. The Court can collect information from other sources, but has to ascertain the integrity, independence and neutrality of those sources.

[12] Both requested by the Executive Council, see EX.CL/Dec.1013(XXXIII), adopted during its 33rd Ordinary Session of Council; EX.CL/Dec. 1079 (XXXVI) adopted during its 36th Ordinary Session held from 6 to 7 February 2020 held in Nouakchott, Mauritania.

[13] See AU Annual Report 2021. See also Suzgo Lungu, "An Appraisal of the Draft Framework for Reporting and Monitoring Execution of Judgments of the African Court on Human and Peoples' Rights", (2020) 4 *African Human Rights Yearbook* 144.

[14] *Providing reparation for human rights cases: A practical guide for African States*, The Human Rights Implementation Centre, University of Bristol Law School (2021). See *Loi. No.1/07,* Art 43: "Article 43: *La Cour siégeant toutes chambres réunies connaît de la révision des jugements et arrêts coulés en force de chose jugée rendus par toutes les juridictions de la République en matière répressive dans les cas suivants : … 5. lorsqu'en vertu d'une décision rendue par une juridiction internationale ou une institution quasi juridictionnelle supranationale, il a été confirmé qu'il y a eu violation d'une disposition substantielle d'une convention internationale ratifiée par l'État du Burundi"* (unofficial translation : "The Court, sitting in all chambers, shall consider the revision of judgments and rulings which have become res judicata and which have been handed down by all the courts of the Republic in criminal matters in the following cases: ... 5. when, by virtue of a decision rendered by an international court or a supranational quasi-judicial institution, it has been confirmed that there has

b. Cameroon

In April 2011, Cameroon established by decree an ad hoc inter-ministerial committee with the express mandate to coordinate and monitor the implementation of recommendations and decisions of the African Commission (ACHPR), the UN Human Rights Committee (HRC) and the Universal Periodic Review (UPR) process.[15] The inter-ministerial committee is not a standing body but is convened when the Chairperson deems necessary. In relation to the implementation of recommendations and decisions from the ACHPR and HRC, the inter-ministerial committee is responsible for:

- making an inventory of the various matters raised before those bodies;
- monitoring the implementation of recommendations and/or decisions arising from the various matters decided upon;
- proposing follow-up action to recommendations and/or decisions;
- ensuring the effectiveness of the implementation of validated proposals;
- facilitating lines of thought aimed at reducing or avoiding condemnation of the State in the context of matters raised by the bodies;
- considering and pronouncing on the internalization of certain observations and recommendations made by those bodies for the promotion and protection of human rights;
- creating and managing training actions in relation to the promotion and protection of human rights.

Although established in 2011, research has revealed little information about the functioning of the inter-ministerial committee and whether it has been active or effective in discharging its responsibilities.

c. Zambia

In 2012, the Ministry of Justice, through the Department of International Law and Agreements, was given a mandate to prepare national reports on all human rights treaties to which Zambia is a party (Gazette Notice No. 6102 of 2012). The Ministry of Justice was also designated as the focal point responsible for Zambia's implementation of international human rights obligations.[16] Further to that mandate, an inter-ministerial committee of representatives from relevant ministries and departments, the judiciary and the Human Rights Commission was designated to coordinate the preparation of Zambia's periodic reports to international human rights bodies. According to commentators, however, the mandate given to the Ministry of Justice has not yet resulted in the establishment of any "formal structure for the handling of implementation of decisions".[17]

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been a violation of a substantial provision of an international of an international convention ratified by the State of Burundi".)

[15] Debra Long, "Compliance with international human rights decisions in Cameroon: mechanisms in place but a lack of transparency" in Rainer Grote, Mariela Morales Antoniazzi, and Davide Paris (eds.), *Research Handbook on Compliance in International Human Rights Law* (Edward Elgar 2021).

[16] E.g., UN Human Rights Council 2008; UN Committee against Torture 2001.

[17] Rachel Murray and Christian De Vos, "Behind the State: Domestic Mechanisms and Procedures for the Implementation of Human Rights Judgments and Decisions" (2020) 12 *Journal of Human Rights Practice* 22.

B. The European Court of Human Rights

The European Court of Human Rights (ECtHR) is an international court established in 1959. It has jurisdiction to hear individual and State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights (ECHR).[18] It also has jurisdiction to give advisory opinions either at the request of the Committee of Ministers or at the request of national courts.[19] Whereas judgments of the ECtHR are binding upon States "in any case to which they are parties",[20] advisory opinions are not binding.[21]

1. Summary of State Obligations Created by Accepting the Jurisdiction of the ECtHR

Becoming a party to the ECHR entails the acceptance of the jurisdiction of the ECtHR. The effectiveness the ECtHR's jurisdiction, in turn, requires that States take steps to ensure that the ECtHR's jurisdiction will be respected within their domestic legal orders.

As a baseline matter, the effectiveness of the ECtHR's jurisdiction depends upon ensuring that States give effect to the ECtHR's judgments. As noted above, judgments of the ECtHR are binding upon States "in any case to which they are parties".[22] The Convention, however, is silent as to how States should ensure that this obligation is met. As Kunz has noted, "From this [silence], it has generally been concluded that the intention of the drafters was to leave it up to the States to decide how to give effect to the court's judgments internally".[23] Accordingly, it falls to the Contracting Parties to determine the domestic mechanisms by which they will ensure that the ECtHR's judgments are given effect.

In addition to the foregoing, the ECHR and its Protocols identify a number of areas in which domestic action relating to the ECtHR's jurisdiction is specifically required. Protocol 16, for example, requires States to designate which of their national courts are empowered to request advisory opinions from the ECtHR on questions relating to the interpretation and/or application of the Convention and its Protocols. Further, Article 22 requires that States establish a process for the election of judges to the ECtHR and provides criteria which States must use in electing individual judges. Examples of the ways in which States have implemented these specific mandates with respect to the operation of the ECtHR are addressed below. First, however, we address mechanisms that the Contracting Parties have adopted to facilitate the recognition of the ECtHR's judgments in domestic law.

2. State Practice Giving Effect to the Jurisdiction of the ECtHR

The status and nature of the ECHR and Convention rights within the domestic legal orders of the Contracting Parties varies depending upon constitutional structures. In some cases, the Contracting

[18] See ECHR, Art. 19; Art. 32-34.

[19] See ECHR, Art. 47; ECHR Protocol 16, Art. 1.

[20] See ECHR, Art. 46.

[21] With respect to advisory opinions requested by the Committee of Ministers, the ECHR only requires that the ECtHR's opinions "shall be communicated to the Committee of Ministers". Art. 49.3. With respect to requests from national courts, Protocol 16 is explicit, stating that "Advisory opinions shall not be binding". Protocol 16, Art. 5.

[22] See ECHR, Art. 46.

[23] Raffaela Kunz, "Judging International Judgments Anew? The Human Rights Courts before Domestic Courts", 30 *European Journal of International Law* 1129 (2019)

Parties have enacted legislation to incorporate the ECHR into domestic law;[24] in others, the ECHR has entered the domestic order automatically upon its ratification as a matter of the State's constitutional law.[25]

The domestication of the ECHR, through whatever constitutional process, means that individuals may plead Convention rights directly before national judges, who can, in turn, directly enforce or give effect to those rights in the domestic legal order. In some cases, the incorporation of Convention rights in the domestic legal order, and the ability to plead these rights in domestic proceedings, has led to an expansion of the powers of the domestic courts. For example, in Switzerland, the possibility for individuals to take claims to the ECtHR has led the Federal Tribunal to overcome an otherwise strict prohibition on judicial review of legislation. Thus, even though the Federal Tribunal does not have the power as such to quash federal statutes, it now may "disapply" legislation that is not in conformity with the standards of the ECHR.[26] In other States, however, notwithstanding the direct applicability of Convention rights in domestic proceedings, the scope of review available to domestic courts has not changed. Thus, for example, in the United Kingdom although the Convention has been directly incorporated into UK domestic law, the constitutional inability of the UK courts to strike down primary legislation has not changed.[27] Similarly, in France, the conformity of national law with the ECHR is addressed through the review of treaty conformity exercised by ordinary courts applying international fundamental rights standards directly.[28] In Germany, by contrast, the Constitutional Court quashed German legislation after the ECtHR's judgment in *M. v. Germany*,[29] despite the fact that in an earlier case it had found the law in question to be constitutional.[30]

Apart from giving effect to the rights set forth in the Convention, a further question for the Contracting Parties to the ECHR has been with respect to the effect of the ECtHR's judgments, particularly in cases

[24] See, e.g., United Kingdom Human Rights Act 1998, Art. 1; Ireland European Convention on Human Rights Act (2003). In Germany, the ECHR was introduced into the German legal order by a federal law of approval (*Zustimmungsgesetz*), adopted by the German Parliament (*Bundestag*) on 7 August 1952. See *Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, BGBl. 1952 II, 685.

[25] See, e.g., Spain, *Instrumento de Ratificación del Convenio para la Protección de los Derechos Humanos y de las Libertades Fundamentales, hecho en Roma el 4 de noviembre de 1950, y enmendado por los Protocolos adicionales números 3 y 5, de 6 de mayo de 1963 y 20 de enero de 1966, respectivamente*, BoE no. 243 of 10 October 1979, 23564.

[26] Federal Supreme Court (Switzerland), 15 November 1991, BGE 117 Ib 367. On this case, see Hanspeter Mock, Michel Hottelier, and Michel Puéchavy, *La Suisse devant la Cour européenne des droits de l'homme* (2nd ed., Anthemis 2011), 28–29. See Raffaela Kunz, "Judging International Judgments Anew? The Human Rights Courts before Domestic Courts", 30 *European Journal of International Law* 1129 (2019).

[27] United Kingdom Human Rights Act 1998. The UK Human Rights Act permits the courts to issue a "declaration of incompatibility" in cases in the compatibility of primary legislation with the ECHR is in question. Art. 4. However, the Human Rights Act further notes that the issuance of a declaration of incompatibility "does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and is not binding on the parties to the proceedings in which it is made". Art. 4(6)(a)-(b).

[28] Vladimira Pejchalova Grunwaldova, "General and Particular Approaches to Implementation of the European Convention on Human Rights", 55 *Canadian Yearbook of International Law* 248, 273 (2017).

[29] ECtHR, *M. v. Germany*, Appl. no. 19359/04, Judgment of 17 December 2009.

[30] Federal Constitutional Court (Germany) 2 BvR 2365/09, *Sicherungsverwahrung*, 4 May 2011, BVerfGE 128, 326. See Raffaela Kunz, "Judging International Judgments Anew? The Human Rights Courts before Domestic Courts", 30 *European Journal of International Law* 1129 (2019).

to which the State has not been a party.[31] In some cases, this has been achieved by the precedential rulings of domestic courts. In others, the issue has been addressed through statute.

In the Netherlands, for example, the status of judgments of the ECtHR has been addressed pursuant to the so-called "incorporation theory", developed by the Dutch Supreme Court. In accordance with this theory, the authoritative interpretations of the ECtHR with respect to Convention rights are integrated into the treaty provisions to which they apply.[32] This means that when a Dutch court is called upon to interpret or apply a provision of the ECHR, it must do so in the light of all relevant ECtHR precedents. The practical consequence is that Dutch courts (and other Dutch State organs) are obliged to give effect to the legal rulings of ECtHR judgments rendered against other States through their application and interpretation of the relevant ECHR Article.[33] In the UK, the situation is similar, although unlike the Netherlands the position in the UK is addressed by statute.[34]

3. The Implementation of Specific Convention Articles

a. Protocol 16: Advisory Opinion Procedure

Protocol No. 16 enables the highest national courts and tribunals of the ECHR's Contracting Parties to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention and its Protocols.[35] Requests for advisory opinions can only be made in the context of cases pending before a national court or tribunal, with the ECtHR having discretion to accept a request or not.[36] As noted above, advisory opinions of the ECtHR are non-binding.[37]

Contracting Parties accepting Protocol No. 16 are required to designate at the time of signature or when depositing its instrument of ratification, acceptance or approval the courts and tribunals within their domestic legal orders that shall have the capacity to request an advisory opinion.[38] Nothing in Protocol 16, however, provides directions with respect to the process by which the Contracting Parties make

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[31] As noted above, judgments of the ECtHR are binding upon States "in any case to which they are parties". ECHR, Art. 46.

[32] Dutch Supreme court, Judgment, HR 10 November 1989, nJ 1990, 628; Dutch Supreme court, Judgment, HR 10 May 1996, nJcM-Bulletin 21 (1996), 683–695. Similarly, note the decision of the French Supreme Court declaring a provision of the law on criminal procedure inapplicable following two judgments of the ECtHR rendered against Turkey. Court of Cassation (France) 589-592, judgments of 15 April 2011, referring to ECtHR, *Case of Salduz v. Turkey*, Appl. no. 36391/02, Judgment (GC) of 27 November 2008; *Case of Dayanan v. Turkey*, Appl. no. 7377/03, Judgment of 13 October 2009, cited in Raffaela Kunz, "Judging International Judgments Anew? The Human Rights Courts before Domestic Courts", 30 *European Journal of International Law* 1129 (2019).

[33] Erika de Wet, "The Reception Process in the Netherlands and Belgium", in Alec Stone Sweet & Helen Keller (ed.), *A Europe of Rights: The Impact of the ECHR on National Legal Orders* (Oxford University Press 2008), 229, 237.

[34] Under Article 2 of the Human Rights Act 1998, "[a] court or tribunal determining a question which has arisen in connection with a Convention right must take into account [*inter alia*] any (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights. . . ." See also Ireland, European Convention on Human Rights Act (2003), Art. 4.

[35] Protocol No. 16, Art. 1(1).

[36] Ibid., Art. 1(2) & Art. 2.

[37] Ibid., Art. 5.

[38] Ibid., Art. 10.

their designations. Thus, although Protocol No. 16 mandates domestic action by the Contracting Parties – designation of courts and tribunals – the modality for satisfying that mandate is left to the Contracting Parties themselves.

It is not necessary here to recount the different designations made by the Contracting Parties pursuant to Protocol No. 16, Article 10. It does bear noting, however, that although Article 10 creates a mandatory obligation, not all Contracting Parties have made the requisite designation.[39]

b. Article 22 ECHR: Election of Judges

Article 22 of the ECHR provides that judges of the ECtHR "shall be elected by the Parliamentary Assembly [of the Council of Europe] with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party". Article 22 thus sets out a cooperative process: national governments select three candidates while the Parliamentary Assembly elects one of them as a judge.

The procedure leading to the election of judges to the ECtHR has several stages. In the first instance a Contracting Party must select its candidates to serve as a judge on the Court. In assembling its list of candidates, the Contracting Party must bear in mind Article 21 of the ECHR which identifies baseline criteria for serving as a judge.[40] Beyond Article 21, Contracting Parties must also take into account the "Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights", adopted in 2012.[41] Although the Guidelines are not binding rules, they provide important directions to the Contracting Parties not only with respect to the criteria for candidates for judicial appointment, but also with respect to the processes by which Contracting Parties should select their candidates. Thus, Article III of the Guidelines provides directions with respect to the way in which Contracting Parties should solicit applications from individuals interested in standing for election to the Court.[42] Moreover, Article IV provides guidance as to the procedures Contracting Parties

[39] See the list of declarations maintained by the Council of Europe: www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=214&codeNature=0

[40] Article 21 provides:

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
2. Candidates shall be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly, further to Article 22.
3. The judges shall sit on the Court in their individual capacity.
4. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

[41] Council of Europe, Committee of Ministers, "Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights", CM(2012)40-final (29 March 2012). See also Council of Europe, Parliamentary Assembly, "Procedure for the Election of Judges to the European Court of Human Rights", Memorandum Prepared by the Secretary General of the Assembly, SG-AS (2022) 01Rev6 (29 September 2022).

[42] Article III provides:

1. The procedure for eliciting applications should be stable and established in advance through codification or by settled administrative practice. This may be a standing procedure or a procedure established in the event of each selection process. Details of the procedure should be made public.

should follow for drawing up their lists of candidates.[43] Finally, Article V sets out guidance regarding the procedures and criteria by which Contracting Parties should finalise their candidate lists.[44]

Once a Contracting Party has prepared its list of candidates, it must submit that list to the "Advisory Panel of Experts".[45] The mandate of the Advisory Panel of Experts is to advise the Contracting Parties whether candidates for election as judges meet the criteria stipulated in Article 21 and the Guidelines.[46] Following the Advisory Panel of Experts' assessment of the candidates shortlisted by the Contracting Parties, the final election is made by the Parliamentary Assembly.[47]

The Contracting Parties have adopted a variety of procedures to implement the requirements regarding nominations. In the United Kingdom, for example, the nomination of judges to the ECtHR is addressed by statute in Article 18 of the Human Rights Act 1998, which clarifies, *inter alia*, the judicial offices within the British judiciary from which candidates for the ECtHR may be drawn. In Greece, the composition of the list of candidates for the election to the ECtHR is conducted by a call to submit

2. The call for applications should be made widely available to the public, in such a manner that it could reasonably be expected to come to the attention of all or most of the potentially suitable candidates.
3. States should, if necessary, consider taking additional appropriate measures in order to ensure that a sufficient number of good applicants present themselves to allow the selection body to propose a satisfactory list of candidates.
4. If the national procedure allows or requires applicants to be proposed by third parties, safeguards should be put into place to ensure that all applicants are considered fairly and impartially, and that suitable applicants are not deterred or prevented from putting themselves forward.
5. A reasonable period of time should be given for the submission of applications.

[43] Article IV provides:

1. The [Contracting Party] body responsible for recommending candidates should be of balanced composition. Its members should collectively have sufficient technical knowledge and command respect and confidence. They should come from a variety of backgrounds, be of similar professional standing and be free from undue influence, although they may seek relevant information from outside sources.
2. All serious applicants should be interviewed unless this is impracticable on account of their number, in which case the body should draw up, based on the applications, a shortlist of the best candidates. Interviews should generally be based upon a standardised format.
3. There should be an assessment of applicants' linguistic abilities, preferably during the interview.
4. All members should be able to participate equally in the body's decision, subject to the requirement that its procedures ensure that it is always able to reach a decision.

[44] Article V provides:

1. Any departure by the final decision-maker from the selection body's recommendation should be justified by reference to the criteria for the establishment of lists of candidates.
2. Applicants should be able to obtain information concerning the examination of their application, where this is consistent with general principles of confidentiality in the context of the national legal system.
3. The final list of candidates to be presented to the Parliamentary Assembly should be made public by the High Contracting Party at national level.

[45] Council of Europe, "Resolution on the Establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights", CM/Res(2010)26, Art. 5.

[46] Ibid., Art.1.

[47] ECHR, Art. 22.

applications to the Ministry of Foreign Affairs that reiterates the criteria set out in Article 21 of the ECHR.[48] In Ukraine, the selection of nominees proceeds pursuant to a resolution of the Cabinet of Ministers, which establishes a commission for the selection of candidates.[49] In Poland, the selection procedure for candidates is governed by an ordinance issued by the Minister of Foreign Affairs in 2012 (and subsequently amended), which, it bears noting, has been the subject of controversy for not following a number of the practices set out in the Guidelines provided by the Parliamentary Assembly.[50]

C. Inter-American Court of Human Rights

The Inter-American Court of Human Rights ("IACtHR") was created by the American Convention on Human Rights ("ACHR")[51] as one of the two organs overseeing the fulfilment of the commitments made by the parties. The other organ is the Inter-American Commission on Human Rights ("IACommHR"), which was established by the Organisation of American States ("OAS") in 1959 and is also regulated by the ACHR.

1. Summary of the Obligations of the ACHR

Different provisions in the ACHR request or allow States to adopt measures in order to implement the Convention and the jurisdiction of the IACtHR and the IACommHR:[52]

- Article 2 provides that "the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect" the rights or freedoms referred to in the Convention.

- Article 45.1 provides that "Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention."

- Article 62.1 establishes that "A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention."

- Article 68.1 provides that "The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties."

[48] See "Invitation of Expression of Interest", Joint Invitation by the Minister of Foreign Affairs and Minister of Justice of the Hellenic Republic to Candidates for the Position of Greek Judge at the European Court of Human Rights (dated 31 October 2019).

[49] See Resolution of the Cabinet of Ministers of Ukraine, No. 524,"On the Selection of Candidates for the Position of Judge of the European Court of Human Rights" (21 March 2007).

[50] See Joint Position of the Helsinki Foundation for Human Rights, the Polish Bar Council and the [Polish] National Chamber of Legal Advisers, "Election of a Judge of the European Court of Human Rights" (21 May 2020).

[51] The ACHR was signed in 1969 and entered into force in 1978.

[52] The ACHR provides that the expenses of the Court and its Secretariat is included in the budget of the OAS (Article 72).

2. State Practice Implementing the Obligations of the ACHR

Judge Pedro Nikken noted that "States parties to the ACHR are obliged to adopt the legislative and other provisions necessary to make effective in the domestic order all the commitments assumed when ratifying the treaty and recognizing the competence of the protection bodies established therein."[53] As the State practice of the parties to the ACHR reflects, there have been widely different approaches to carrying out this mandate.

Some countries, for example, such as Argentina, have not adopted general legislation and instead have taken the approach of adopting specific regulations in order to comply with specific judgments of the Court or recommendations of the Commission.

Other countries, by contrast, have adopted general regulations. Costa Rica, for example, as host country of the IACtHR, signed the Convention for the Headquarters of the IACtHR, approved by Law No. 6889 of 1983.[54] This agreement, in addition to establishing aspects such as the seat of the Court, privileges and immunities and others, provides that the resolutions of the IACtHR have the same executive and enforceable force as those enacted by the Costa Rican courts (Article 27) and that the Costa Rican government will provide an annual subsidy in order to contribute to the functioning of the Court (Article 28). In addition, Costa Rica created in 2011 the "Interinstitutional Commission for the monitoring and implementation of international Human Rights obligations" and the "Advisory Committee" and the "Permanent Consultation Body".[55] The purpose of these bodies is to coordinate the implementation at the national level of international obligations on human rights, as well as actions carried out at the international level in the field of human rights, in order to strengthen the promotion and defence of these rights.

Peru, for its part, enacted in 2002 Law No. 27,775, which regulates the procedure for the execution of judgments issued by international tribunals.[56] That law is complemented by Article 115 of the Constitutional Procedural Code, which provides in relevant part that the resolutions of the jurisdictional bodies to whose jurisdiction Peru has expressly accepted do not require, for their validity and effectiveness, any prior recognition, review, or examination.[57] Similarly, Colombia has made modifications in its domestic legal system due to the international obligations it assumed when ratifying the ACHR and accepting the jurisdiction of the IACtHR. Law No. 288 of 5 July 1996 establishes a procedure for the payment of compensation for damages caused by human rights violations declared by international human rights bodies.[58]

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[53] Pedro Nikken, "El Derecho Internacional de los Derechos Humanos en el derecho interno" *Revista IIDH/Instituto Interamericano de Derechos Humanos*, No. 57, 11 -68, at 38.

[54] Convenio para la Sede de la Corte Interamericana de Derechos Humanos, Law No. 6889 of 1983.

[55] Costa Rica, Executive Decree No. 36776-RE, dated 9 August 2011.

[56] Law No. 27775, El Peruano, 7 July 2002, p. 225.952.

[57] Código Procesal Constitucional, Article 115.

[58] Law No. 288, 5 July 1996.

II. DISPUTE SETTLEMENT MECHANISMS UNDER TREATIES ADDRESSING THE TREATMENT OF INTERNATIONAL INVESTMENT

A. Arab Investment Court (AIC)

The 1980 Unified Agreement for the Investment of Arab Capital in the Arab States[59] ("Arab Investment Agreement") is a treaty concluded by the members of the Arab League. It was the first investment agreement to establish a permanent forum for the settlement of investor-State disputes: the Arab Investment Court ("AIC"). The AIC was established in 1983 and has been operational since 2003.[60] Reportedly, the AIC has issued 22 decisions, which are all only available in Arabic.

1. Summary of the Obligations of the Arab Investment Agreement

The Arab Investment Agreement establishes the AIC, but the procedural rules of the Court are further set forth in two additional instruments, namely the AIC Rules of Procedure and the AIC Statute.[61] The relevant provisions of these instruments that are directly addressed to the States Parties are as follows:

- Article 28(2) of the Arab Investment Agreement sets forth that "the Court shall be composed of at least five judges and several reserve members, each having a different Arab nationality, who shall be chosen by the Council from a list of Arab legal specialists drawn up specifically for such purpose, two of whom are to be nominated by each State Party from amongst those having the academic and moral qualifications to assume high-ranking legal positions. The Council shall appoint the chairman of the Court from amongst the members of the Court." The AIC Statute further provides that the five judges and reserve members of the Court must be of a different nationality.[62] The States Parties present candidates (a main candidate and an alternate) from among its citizens at least one month before the election date. Candidates are elected based on simple majority in the secret ballot.[63] The AIC Statute provides that adjudicators shall have qualifications equivalent to those occupying the highest judicial positions and shall be persons of high moral character.[64]

- Article 34(3) of the Arab Investment Agreement provides that a judgment delivered by the AIC "shall be enforceable in the States Parties, where they shall be immediately enforceable in the same manner as a final enforceable judgment delivered by their own competent courts."[65]

Amendments to the Arab Investment Agreement were opened for adoption in 2013. Among other things, the revised text adds a number of provisions with respect to mediation, conciliation and

[59] https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2394/download.

[60] Walid Ben Hamida, "The First Arab Investment Court Decision" 7 *Journal of World Investment & Trade* 699 (2006).

[61] The AIC Rules of Procedure and the AIC Statute are only available in Arabic. See the website of the League of Arab States, see http://www.lasportal.org/ar/legalnetwork/Pages/Investment_CourtSystems.aspx.

[62] AIC Statute, Article 2(1)-(2) and Article 3(5). The AIC judges are elected through secret ballot by the LAS Economic and Social Council at a special council meeting from a list of nominees prepared by the AIC Secretariat.

[63] AIC Statute, Articles 3(2)-(4) and 8(1).

[64] AIC Statute, Articles 2(1), 3(1) and 8(1)

[65] See also AIC Rules of Procedure, Article 35 and 46 (only available in Arabic).

arbitration. There is conflicting information as to whether the 2013 Amended Agreement has entered into force, and this report has not been able to confirm the current status of the amendments.[66]

That said, among the noteworthy provisions of the 2013 amendments is Article 3(11) of the Annex to the amended text, which provides that that "[t]he arbitration award shall be enforced in accordance with Article 37 of the Riyadh Agreement on Judicial Cooperation."[67] This provision would support the jurisdiction of the AIC by confirming the applicability of Article 37 of the Riyadh Convention, which sets forth that awards may be recognized enforced "in the manner stipulated in this Part, subject to the legal norms of the requested party", and establishes limited grounds for refusal. Further, under Article 10(c) of the 1980 Agreement and Article 9 (b) of the 2013 Amended Agreement, a covered investor is entitled to equitable compensation for damages sustained by State acts, including "preventing the execution an enforceable judgment or arbitration award related directly to the investment."

2. State Practice Implementing the Obligations of the Arab Investment Agreement

The AIC and its constituent agreements establish a complicated and largely untested regime for enforcement of adverse judgments and arbitral awards. According to Walid Ben Hamida: "The enforcement mechanism for decisions of the Arab Investment Court has not been tested. No enforcement proceedings have been initiated to enforce a decision rendered by the Court."[68]

Research of national legislation on the implementation of the Arab Investment Agreement in Egypt, Jordan, Tunisia, the UAE and Saudi Arabia has not disclosed any specialised legislation with respect to the AIC's jurisdiction. As far as enforcement is concerned, it would appear to generally follow the approaches found in the ICSID Convention, the New York Convention, Riyadh Convention and domestic laws generally governing civil procedure, commercial arbitration, and foreign judgments.

The case *Mohamed Abdulmohsen Al-Kharafi & Sons Co v The Government of the State of Libya and others*, Award (22 March 2013), rendered under the 1980 Agreement, highlights the complexities around the AIC system. First, Libya challenged the *Al-Kharafi* award before the AIC. This resulted in two AIC decisions favouring the investor: the first (2014 Decision) clarified that the AIC has no jurisdiction to annul arbitral awards under the 1980 Agreement, and the second (2017 Decision) clarified that the AIC has no jurisdiction to declare arbitral awards unenforceable.

As of the date of this report, the enforceability of the *Al-Kharafi* award continues to be litigated before the Egyptian and French courts. Interesting for present purposes is that the Libyan annulment challenges to the *Al-Kharafi v Libya* award before Egyptian courts illustrate that Egypt has no special law implementing the Arab Investment Agreement.

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[66] Sources that state that the 2013 Amended Agreement is not yet in force include the UNCTAD International Investment Agreement database and a 2018 note by Blanke Arbitration FZCO. Sources that state that the amendment has entered into force include a 2016 report by Al Tamimi & Co. The depository for the AIC is the Secretariat of the League of Arab States, but it does not appear to provide clear information on the status of ratification. If the 2013 Amended Agreement is in force, it only applies to disputes between investors and governments of the ratifying States. Disputes involving non-ratifying States will still be based on the 1980 Agreement.

[67] Article 3(11) of the 2013 Annex to the amended text.

[68] Walid Ben Hamida, "Arab Investment Court" *Max Planck Encyclopaedia of International Procedural Law* (online version) (December 2018), pt 42. Similarly, no national implementation legislation or practice on how a country selects its nominees for serving as judge at the AIC could be identified.

B. Energy Charter Treaty

The Energy Charter Treaty (1994) ("ECT") is a multilateral agreement dealing with inter-governmental cooperation in the energy sector. The ECT covers a broad range of matters, including investment protection. The ECT has two main international dispute resolution mechanisms: First, Article 26 of the ECT governs disputes between a Contracting Party and an investor of another Contracting Party. Second, Article 27 of the ECT governs disputes between States Parties concerning the application and interpretation of the treaty.

1. Summary of Dispute Settlement Obligations in the ECT Addressed to the States Parties

Several provisions of the ECT request or allow contracting parties to adopt measures to implement the treaty's dispute settlement mechanisms. For example:

- Article 26(3)(b)(ii) provides that the States Parties listed in Annex ID (i.e., States which do not give unconditional consent to arbitration when the investor has previously submitted the disputes to local courts, an administrative tribunal or other previously agreed dispute settlement procedure), "shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41."

- Article 26(8), last sentence, provides that each Contracting Party "shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards."

- Article 27 includes different requirements for contracting States involved in a dispute regarding the constitution and functioning of an ad hoc arbitral tribunal.

Other provisions of the ECT indicate specifically that domestic implementation is not necessary, for example:

- The Understanding regarding Article 26(2)(a) (i.e., the article dealing with the settlement of disputes by courts or administrative tribunals of the contracting party to the dispute) provides that "Article 26(2)(a) should not be interpreted to require a Contracting Party to enact Part III of the Treaty [Investment Promotion and Protection] into its domestic law."

2. State Practice Implementing the Obligations of the ECT

Hobér notes that even though the requirements of Article 26(3)(b)(ii) are mandatory, as of 1 January 2019 not all of the States listed in Annex ID had submitted the required written statements.[69] Among those parties which had done so, Spain submitted a statement that it would consent to ECT arbitration provided that the investor withdraws from any other previous procedure. The European Union had noted that its consent to arbitration is did not extend to any dispute which had been previously submitted to the European Court of Justice. In 2021, the Grand Chamber of the CJEU declared, as a matter of EU law, that the jurisdiction of tribunals established under the ECT tribunals did not extend to disputes arising between EU Member States.[70]

[69] Kaj Hobér, *The Energy Charter Treaty: A Commentary* (Oxford University Press 2020), 438.

[70] *Republic of Moldova v. Komstroy LLC*, Case C-741/19 (2 Sept 2021).

C. The Investment Court System under EU International Investment Agreements[71]

1. Summary of Dispute Settlement Obligations in EU International Investment Agreements Addressed to the States Parties

In its investment treaty making since the Treaty of Lisbon (2009), the EU has established a new model of investor-State dispute settlement, which entails the replacement of ad hoc arbitral tribunals with standing, treaty-based investment courts, staffed with judges appointed by the States Parties. As of the date of this report, the EU has concluded investment agreements ("EU IIAs") that contain this new investment court system ("ICS") with Canada, Mexico, Singapore, and Viet Nam.[72] That said, it warrants noting that none of the EU's investment treaties have yet come into force.[73] Consequently, there is at present no functioning version of the ICS.

Under these EU IIAs, most of the provisions relating to the ICS are addressed to the treaty-based investment courts themselves. Two provisions, however, are directed to the States Parties and require or implicate implementation at the national/EU level. For present purposes, the provisions of the EU-Canada Comprehensive Economic Trade Agreement (CETA) serve to illustrate the content of these provisions.

a. Determination of the Respondent for Disputes with the EU or its Member States[74]

Because both the EU as a legal entity and the EU Member States individually are parties to the EU's investment treaties, provisions are included in these treaties with respect to determination of the respondent in cases involving an alleged breach of the Agreement by the EU or an EU Member State. In such a case, under the procedure laid out in Article 8.21, the investor is required initially to deliver to the EU a notice requesting a determination of the respondent, setting forth the measures in respect of which the investor intends to submit a claim.[75] In response, the EU is obliged to inform the investor as to whether the EU or an EU Member State will be the respondent.[76] In the event that the EU fails to provide the investor with a timely designation, Article 8.21.4 contains rules for the default designation of the EU or an EU Member State as the respondent. Once the respondent has been determined, either

[71] For the purpose of the present report, IIAs concluded by the EU encompass FTAs with investment chapters/substantive investment commitments, as well as stand-alone Investment Protection Agreements (IPAs).

[72] Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, [2017] OJ L 11/23 (CETA); Investment Protection Agreement between the European Union and Singapore (authentic text of April 2018; not yet in OJ) (EU-Singapore IPA); Free Trade Agreement between the European Union and Mexico (authentic text of April 2018; not yet in OJ) (EU-Mexico FTA); Investment Protection Agreement between the European Union and Vietnam, (authentic text as of August 2018; not yet in the OJ), (EU-Vietnam IPA).

[73] The slight qualification to this statement is that select parts of CETA have been given "provisional application" by the parties. See EU Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Official Journal of the European Union L 11/1080 (14 January 2017). With respect to investment, however, the sections being given provision application do not include the provisions on investment protection nor the provisions on ISDS, i.e., the ICS.

[74] Article 8.21 CETA. See also Article 3.5 EU-Singapore IPA; Article 3.32 EU-Viet Nam IPA ; Article 4, Chapter on Resolution of Investment Disputes, EU-Mexico FTA.

[75] Article 8.21.2 CETA.

[76] Article 8.21.3 CETA.

by EU designation or default, the investor may submit its claim.[77] Further, once the respondent has been determined pursuant to Article 8.21, neither the EU nor an EU Member State may raise an objection before the ICS court[78] and, moreover, the ICS court is bound by the determination made by the EU.[79]

Although Article 8.21 establishes the EU's obligation to notify claimants of the appropriate respondent in cases involving an alleged breach of CETA by the EU or an EU Member State, CETA leaves it to the EU to establish its own internal rules for how it will make that determination. The EU has done this in Regulation No. 912/2014, which sets out, *inter alia*, the process by which the EU and its Member States will decide whether the EU or a Member State will act as the respondent in a particular proceeding.[80]

b. Enforcement of ICS Awards[81]

The enforcement of ICS awards under CETA is addressed in Article 8.41, which links enforcement of ICS awards with both the New York and ICSID Conventions. Article 8.41.4 of CETA establishes the general principle that the execution of an ICS award shall be governed by the laws in force at the place where execution is sought. Article 8.41.5 of CETA sets out the agreement of the States Parties that final ICS awards shall be deemed as arising out of a "commercial" relationship for the purpose of Article I of the New York Convention. Further, with respect to the ICSID Convention, Article 8.41.6 sets out the view of the States Parties that if a claim has been submitted to the ICS court under the rules of the ICSID Convention, as provided in Article 8.23.2(a), the final ICS award shall qualify as an award under Chapter IV, Section 6 of the ICSID Convention.

Given that all of the CETA parties (and all of the EU's investment treaties) are parties to the New York Convention, enforcement of ICS awards rendered through non-ICSID arbitration will in principle rely upon existing frameworks for the enforcement of foreign arbitral awards.[82] As to awards which the States Parties treat as having proceeded pursuant to the ICSID Convention and its rules, again, the approach by the States Parties will be presumably to give such awards effect through existing mechanisms for the enforcement of ICSID awards.[83]

[77] Article 8.21.5 CETA: "The investor may submit a claim pursuant to Article 8.23 on the basis of the determination made pursuant to paragraph 3, and, if no such determination has been communicated to the investor, on the basis of the application of paragraph 4."

[78] Article 8.21.6 CETA.

[79] Article 8.21.7 CETA.

[80] Regulation No. 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-State dispute settlement tribunals established by international agreements to which the European Union is party, [2014] OJ L 257/121. See Art. 4-9.

[81] Article 8.41 CETA. See also Article 3.57 EU-Viet Nam IPA; Article 3.22 EU-Singapore IPA; Article 31; Chapter on Resolution of Investment Disputes EU-Mexico FTA.

[82] For an overview of these laws in the EU Member States and Canada, see Marc Bungenberg and Anna Holzer, "Article 8.41 Enforcement of Awards" in Marc Bungenberg and August Reinisch, *CETA Investment Law* (Nomos/Hart 2022) 873-875. In the other States with which the EU has concluded treaties containing the ICS, the relevant laws are: Singapore, International Arbitration Act (Cap. 143A); Viet Nam, Law on Commercial Arbitration No. 54/2010/QH12 (LCA); and Mexico, 1993 Federal Commercial Code of Mexico, Art. 1415-1480.

[83] See Section II above. Note that as of the date of this report, Poland and Viet Nam are not parties to the ICSID Convention.

c. Ancillary State Practice with Respect to ICS Jurisdiction: Financial Responsibility between the EU and its Member States in the Event of an Investor-State Dispute

Although EU IIAs contain provisions addressing the EU's obligation to designate the appropriate respondent in cases involving an alleged breach by the EU or one of its Member States, EU IIAs do not contain any provisions with respect to the apportionment of responsibility between the EU and its Member States for the financial aspects of an investor claim, e.g., legal costs of defence, compensation to the investor, etc. Nevertheless, the apportionment of financial responsibility is an important question for the EU's internal implementation of the jurisdiction of the ICS and, accordingly, the EU has established rules governing addressing the issue. Thus, in Regulation No. 912/2014, discussed above in connection with the designation of the appropriate EU respondent, the EU has established the rules and process by which the EU and its Member States will allocate financial responsibility in investor-State disputes brought under agreements to which the EU itself is party, or the EU and its Member States are parties.[84]

III. CONCLUSIONS OF THE REPORT

The goal of this present report has been to provide an overview and analysis of the measures that States adopt domestically to implement treaties that establish mechanisms for the resolution of international disputes. The report has looked broadly at both treaties that include dispute settlement mechanisms to resolve disputes concerning the substantive obligations contained therein as well as treaties that establish frameworks for dispute resolution *simpliciter* which may be used to resolve disputes arising under a variety of substantive treaties. We have referred to the treaties collectively as IDSM treaties.

The approach of the research contained within this report has been to gather information about State experiences with respect to giving effect to IDSM treaties both at the international and regional levels, giving special attention to a number of recurrent questions: (i) What provisions in IDSM treaties require or implicate the need for States to adopt domestic measures? (ii) What measures do States in fact adopt in domestic law to give effect to IDSM treaties? (iii) What measures do States adopt in order to ensure that the decisions issued pursuant to the dispute resolution mechanisms of an IDSM treaty are given legal effect within the domestic order? (iv) What steps do States take in domestic law to ensure the functioning of the courts, tribunals and other dispute settlement mechanisms established by IDSM treaties, e.g., with respect to funding, appointment of adjudicators, etc.?

In taking this approach, the analysis and information contained in this report is intended to serve three purposes. First, it provides guidance with respect to the design and drafting of an instrument establishing a multilateral investment dispute settlement mechanism. Second, it provides guidance for States when considering what types of implementing measures they may need to adopt in order to give effect to the jurisdiction of a multilateral investment dispute settlement mechanism. Third, it provides insights into the kind of capacity building and technical assistance that States may need in order to adopt such measures.

The central findings of this report may be summarised as follows:

[84] Regulation No. 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-State dispute settlement tribunals established by international agreements to which the European Union is party, [2014] OJ L 257/121. Notably, the Regulation applies not only to claims under EU IIAs with the ICS but also the Energy Charter Treaty (ECT). See Art. 2-3.

1. The effectiveness of international dispute settlement mechanisms relies on the willingness and ability of States to adopt domestic laws and practices to give effect to the jurisdiction of an international dispute settlement process. Therefore, treaties setting up international dispute settlement processes often, but not systematically, requires concrete implementation at the national law level.

2. State practice in giving effect to treaties establishing international dispute settlement mechanisms ranges from the adoption of specific legislation that supports the functioning of the dispute settlement process to ad hoc practices to complete inaction and even resistance.

3. Four fundamental factors explain why State practices differ when implementing treaties establishing international dispute settlement mechanisms: (i) the character of the State's internal legal order (e.g., monist or dualist; civil law or common law), (ii) the provisions of the specific treaty, (iii) internal and external political factors, and (iv) issues of State capacity with respect to the domestic internalisation of international obligations.

4. Treaties establishing international dispute settlement mechanisms have generally left States with broad discretion as to how they will implement the treaties' provisions. In most instances, the treaties do not specify a single way in which they must be implemented. Instead, each contracting State is left to adopt the measures it considers necessary to comply with its international commitments.

5. Sometimes it is not possible to identify implementing regulations adopted by States but rather "practices" with respect to specific issues which arise in connection with IDSM treaties, such as which domestic institution designates adjudicators or panellists to an international court or tribunal, which institution pays for the functioning of the court or tribunal, who represents the State in proceedings before it, etc.

6. The absence of clearly defined obligations for transposition into domestic law, combined with regulatory capacity constraints, appear to contribute to the variable degree to which different IDSM treaties are given effect across States.

7. The great majority of IDSM treaties do not provide for technical assistance or capacity building for States joining the dispute settlement mechanism. As a consequence, available support for States is limited and lacks centralisation.

8. In general, States seem less likely to enact domestic implementation measures with respect to treaties creating jurisdiction for State-to-State claims.

9. In the case of regional economic integration organizations in particular (e.g., EU, ECHR and Mercosur), the implementation of a IDSM treaty may require constitutional amendments, specific legislation and even judicial reform.

10. The implementation of an IDSM treaty generally may require domestic action with respect to matters directly raised by the provisions of the treaty (e.g., enforcement of awards or judgments) and those which are not directly raised by the treaty but otherwise support the State's effective implementation of the treaty (e.g., domestic procedures for funding the State's contribution to the maintenance of the dispute settlement mechanism).

11. Depending upon the treaty and the legal order of a given State, IDSM treaties may require or implicate a need for domestic action on a wide range of issues, including:

a. Designating judges, adjudicators or panellists for the operation of the dispute settlement mechanism established by the IDSM treaty.

b. Ensuring that domestic institutions recognise the international jurisdiction created by the IDSM treaty.

c. Ensuring that rulings of the dispute settlement mechanism established by the IDSM treaty are binding and enforceable in domestic courts.

d. Establishing mechanisms for the State to effect its compliance with rulings of the dispute settlement mechanism.

e. Designating government subdivisions, agencies or other entities that may be parties in disputes.

f. Excluding or including territories from the application of the treaty.

g. Financing and contributing to the budget of the international dispute settlement mechanism.

h. Establishing processes for State agencies and/or courts to resort to the international dispute settlement mechanism, especially with respect to advisory opinions and preliminary references, but also with respect to brining claims.

i. Establishing requirements for non-State parties to access the international dispute settlement mechanism (e.g., exhaustion of local remedies).

j. Establishing processes addressing the representation of the State in proceedings involving the international dispute settlement mechanism.

k. Establishing processes to monitor the State's implementation of its international obligations and to avoid or prevent international disputes with respect to those obligations.

l. Providing for the privileges and immunities of adjudicators.